In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1728

FRANK EDWARD WILLIAMS, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that there was no competent evidence that the car he was convicted of receiving had been stolen, (2) that the admission of certain hearsay testimony was prejudicial error, and (3) that the court erred in delivering a supplemental "*Allen*"-type charge.

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of receiving a stolen vehicle, in violation of 18 U.S.C. 2312. He was sentenced to two years' imprisonment. The court ordered that the sentence be suspended after six months had been served and that petitioner then serve three years on probation. The court of appeals affirmed (Pet. App.).

1. Petitioner's contention that his conviction was not based on competent evidence that he had received stolen property is without merit.

The government's principal witness, Robert Pinckney, testified that he had delivered three cars he had obtained in New Jersey, including a blue 1970 Chevrolet Impala, to petitioner in South Carolina (Tr. 145-146). Pinckney informed petitioner that the cars, which were registered in New York, were "hot" (Tr. 131, 149). Petitioner paid Pinckney about $1,400 for the Impala (Tr. 146), and Pinckney furnished petitioner with a New York registration card for the car and a bill of sale showing a different price from that actually paid by petitioner (Tr. 148). Pinckney identified a photograph of the car seized from petitioner as similar to the one he had brought him (Gov. Ex. 6-13, Tr. 151) and stated that the car had broken locks when he sold it to petitioner and that petitioner had commented about them (Tr. 151). Mrs. Lillian Winnegrad testified that a blue 1970 Chevrolet Impala she owned, having a serial number 164370T disappeared from her home in New York on January 24, 1970 (Tr. 13). After the judge had noted that there was a discrepancy between the fifth digit in this number and that in the one set forth in the indictment, Mrs. Winnegrad was recalled to the stand and testified from her purchase order for the car (Gov. Ex. 3) that the correct registration number was 164390T (Tr. 60), which conformed to the indictment.

An official of the South Carolina Highway Department testified that the government's exhibit 4 was a copy of a vehicle registration card issued to petitioner's funeral home on February 4, 1970, for a 1970 Chevrolet with the same registration number Mrs. Winnegrad had stated to be that of her missing car (Tr. 68).

The card indicated that the car had been purchased by petitioner's funeral home from petitioner. What purported to be a New York registration, supplied to the South Carolina Highway Department by petitioner (Gov. Ex. 5), indicated that a registration had been issued to petitioner for the car by the State of New York and listed his address as 126 E. 124th Street, New York City (Tr. 69-70). A photograph of the car, taken after the vehicle was seized from petitioner, showed that it had the same registration numbers as described by Mrs. Winnegrad (Gov. Ex. 6-4, Tr. 74).

No objection was made during this testimony to its competency or sufficiency. It was only at the end of the trial that petitioner moved for acquittal because the government had failed to prove the car was stolen Since it is clear that there was sufficient evidence to establish that the car received by petitioner had in fact been stolen, including the testimony of the seller, Pinckney, that he informed petitioner that the car was "hot" and the testimony of Mrs. Winnegrad that her car had disappeared, the judge correctly overruled petitioner's motion.

2. Petitioner also contends that he was prejudiced by the admission of certain hearsay testimony. A special agent for the National Automobile Theft Bureau and an F.B.I. agent testified that through their conversations with the National Automobile Theft Bureau and the National Crime Information Center, a similar agency, they had learned the registration number of the vehicle stolen from Mrs. Winnegrad, and they repeated the number in court. The judge ruled that this testimony was inadmissible hearsay and instructed the jury to disregard it completely (Tr. 353-355). There is no reason to believe that the jurors were incapable of following this instruc-

tion, and in any event, since there was substantial evidence that the car received by petitioner had been stolen, he hardly could have been prejudiced.

3. Finally, petitioner contends that the court erred in employing an "*Allen*"-type charge. The jury retired to deliberate at 1:25 p.m. (Tr. 377). At 4:07 p.m., the jury requested an explanation of the term "beyond a reasonable doubt" (Tr. 378). The court instructed it on the meaning of the term, and it again retired at 4:15 p.m. (Tr. 379-380). Later in the evening the jury returned without having reached a verdict (Tr. 380-381). Following a recess, they deliberated from 8:45 until 11:30 that evening (Tr. 382). Deliberations began again at about 8:30 the next morning (Tr. 381). At 10:40, the jury indicated to the court that it still could not agree (Tr. 382). The jurors were then called back into court, and the court delivered a supplemental "*Allen*"-type charge (Tr. 382-388), which petitioner agrees conforms to the charge approved for use by the Fourth Circuit. *United States* v. *Sawyers*, 423 F. 2d 1335.[1]

Deliberations resumed at 10:55 a.m., and at 11:40 a.m. the jurors indicated to the court that they were confused as to which cars were involved in Counts II and III of the indictment, respectively (Tr. 388-389). At 11:45 a.m., the jurors were called into court and the judge repeated the description of the cars whose thefts were charged in the indictment (Tr. 391-392).

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[1] While the charge did note the expense of a retrial to "both sides," it specifically urged the jurors to endeavor to reach a unanimous verdict "without violence to your own individual judgment and conscience." The district court also emphasized "that the court does not wish any juror to surrender his or her convictions" (Tr. 383).

After the judge had finished, one juror explained that the jury had thought that Count II involved the brown car described in Count III instead of the blue Chevrolet Impala and that had been where they were making their mistake (Tr. 392-393). The jury retired at 11:55 a.m. and returned ten minutes later with a verdict of guilty as to Count II and not guilty as to Count III (Tr. 393-396). A poll of the jurors indicated each agreed with the verdict (Tr. 396).

Although three courts of appeals, in exercise of their supervisory powers, have recently determined that the "*Allen*" instruction should be abandoned in favor of modified forms of the charge,[2] no court of appeals has held that the traditional "*Allen*" instruction or the mitigated form utilized in this case is *per se* so coercive that a conviction following it must be reversed. Indeed, after the recent *en banc* consideration of this issue in the Fifth Circuit, that court refused to exercise its supervisory power to supplant use of the "*Allen*"

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[2] *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 422 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017; *United States* v. *Thomas*, 449 F. 2d 1177 (C.A.D.C.). See also *United States* v. *Silvern*, No. 72-1133, decided August 7, 1973, in which the Seventh Circuit affirmed a conviction involving use of a traditional *Allen* charge but admonished that any future supplemental charges deviating from the form of Instruction 8.11 of *Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 39, 97-98, would be reversed. To our knowledge, only five states—Arizona, Pennsylvania, Alaska, Illinois and Montana—have disapproved instructions patterned substantially after the *Allen* charge. See *Instructing Deadlocked Juries: The Present Status of the Allen Charge*, 3 Tex. Tech. L. Rev. 313, 317-319 and n. 17, 327-331 (1972); *The Allen Charge Dilemma*, 10 Amer. Crim. L. Rev. 637, n. 108, 664 (1972). "*Allen*"-type instructions have been approved in at least 29 states.

charge in favor of any alternative instruction. *United States* v. *Bailey*, No. 72-1799, decided June 13, 1973. The development and use of the "*Allen*"-type instruction is being continually reexamined by the various circuits, and there is no necessity for this Court to reconsider *Allen* at this juncture before the courts of appeals have had an opportunity to see how their proposed changes work in actual practice.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.